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DAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-459

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,

—and—

JOSE DIAZ and ENILDA DIAZ, his wife WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, SETH W. WATSON, JR., and ANNE P. WATSON, his wife, and HENRY E. CROUTER, *Appellants*,

v.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN, *Appelles*.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

REPLY BRIEF OF APPELLANTS JOSE DIAZ AND ENILDA DIAZ, HIS WIFE, WILLIAM ZIMMERSPITZ AND NANCY ZIMMERSPITZ, HIS WIFE, F. CARL KRETZMANN AND KATHERYN L. KRETZMANN, HIS WIFE, ARTHUR HARVEY AND MURIEL HARVEY, HIS WIFE, DANIEL F. X. POWELL AND ANNA T. POWELL, HIS WIFE, SETH W. WATSON, JR., AND ANNE P. WATSON, HIS WIFE.

(Signatures on page 2 of cover)

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ARGUMENT

The Appellees, in their Motion to Dismiss or Affirm, assert that the decision of this Court in *Wolman* v. *Essex*, 342 F.Supp. 399 (E.D. Ohio), *aff'd.*, U.S. , U.S. Law Week (1972), is dispositive of appeal. This contention is unfounded.

1. Twelve Pennsylvania Parents Are Now Before This Court, Raising Equal Protection Arguments Not Raised in the Ohio Case Nor Ever Previously Presented Here.

Mr. and Mrs. Diaz, Mr. and Mrs. Watson and eight other parents sought and were granted intervention in this case. They have raised affirmative defenses based upon the Equal Protection Clause which have never been presented to this Court.

Essex v. *Wolman* did not present any question of Equal Protection either respecting parents whose children attend nonsecretarian schools nor respecting parents whose children attend secretarian schools. No parents were before the Court in that case. Here the parents are, and here those claims are raised.

Due Process demands that these parents be heard. The Equal Protection claims which they have raised are surely not less substantial than constitutional claims which this Court has recognized in many other cases. *Cf. Graham* v. *Richardson,* 403 U.S. 365 (1971) (denial of welfare benefits to aliens unless they have resided in the United States a specified number of years); *Humphrey* v. *Cady,* — U.S. —, 31 L. Ed. 2d 394 (1972) (committing individual to a "sex deviate facility" without jury determination, when similar statute dealing with mental incompetents provided for one); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) (restricting right of welfare recipents to travel). The Appellees

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would have the voices of these parents suppressed and deny to these people the opportunity—*on questions of first impression*—to file a brief and present one half hour's argument to this Court on their claims. Yet it is a fact that these parents are cruelly pressed between the demand of the state that their children attend school, and the demands of religious conscience that those children have what this Court has said must be denied them if they attend public school: a moral and religious formation based upon knowledge and love of God. Parents whose children attend nonsectarian schools are likewise caught between the demands of compulsory attendance and those of intellectual freedom. *Pierce* v. *Hill Military Academy,* 268 U.S. 510 (1925). These parents are not, in today's frightening tax-and-inflation economy, answered by the simplicism, "If they want those freedoms through nonpublic schools, let them pay for them". More importantly, *their Equal Protection arguments were denied any response whatever by the court below, though specially pleaded, briefed and argued*—a travesty of due process which must not be confirmed by this Court.

2. To Grant Appellees' Motion to Dismiss or Affirm Would Leave a Vital Area of the Law in a State of Confusion.

This Court has formulated three tests which legislation must pass in order to withstand the strictures of the Establishment Clause: (a) that of causing no "excessive entanglements" between church and state (b) that of having no "primary effect which advances religion" and (c) that of "secular legislative purpose".

The Court did not specify which of these grounds was the basis for its affirmance in *Essex,* and thus future legislators and litigants are left to speculation

concerning a now prominent area of social legislation and interest. Granting Appellees' Motion to Dismiss or Affirm, without briefing, oral argument and opinion, will only compound this confusion.

It is clear, in any event, that the Pennsylvania case may not be disposed of, as Appellees urge, by the application to it of *Essex*. The Pennsylvania statute differs significantly from the Ohio statute struck down in that case. For example, the challenged and offensive portion of the Ohio statute is woven into the fabric of the Ohio public school district financing legislation. Furthermore, the Ohio statute calls for annual appropriations. Therefore it may have been adjudged by this Court to be void under the test of "excessive entanglement". The Pennsylvania statute is not financed through annual appropriations and does not remotely involve any such entanglement. The District Court found none. Since it is clear that the statute passes the test of "secular legislative purpose" *, and that it contains no feature of "excessive entanglement", the sole remaining basis for voiding the statute would be found in the test of "primary effect which advances religion".

But the "primary effect" test has never before been applied by this Court to a statute such as Pennsylvania's. It cannot be presumed—indeed it would be impertinence to assert—that this Court, in *Essex,* applied *sub silentio* the "primary effect" test. Not since 1968, in *Board of Education* v. *Allen,* 392 U.S. 236 (1968), has the Court applied that test in any case involving use of state funds to afford benefits to chil-

* The District Court found that the statute passes the "secular legislative purpose" test, and that conclusion appears settled. See *Lemon* v. *Kurtzman,* 403 U.S. 602, 613 (1971).

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dren in nonpublic schools, or their parents. *Lemon* v. *Kurtzman, supra,* involved state payments to such schools, but the Court therein declined to apply the "primary effect" test (after having stated that inquiry into Pennsylvania's legislative purposes in enacting the statute there considered "affords no basis for a conclusion that the legislative intent was to advance religion"). *Id.* at 613. To accede to Appellees' request that the Court, in effect, leap-frog from *Allen* to today's Pennsylvania statute, without briefs, without oral argument (and therefore without the fullest possible basis for opinion), would be to make a denigrating mockery of the work of state legislatures. It would further work a marked injustice to the interests of millions of citizens who have honestly labored to find a means of financially safeguarding religious and intellectural liberty in education, not through circumventing the Constitution, but through complying with what this Court itself has held under the Constitution.

The intervening parents, in their Jurisdictional Statement, have pointed out to the Court other questions occasioned by the District Court's decision herein. Prominent among these are its invention of a fourth Establishment Clause test—namely, that a "possible and quite likely" use of public funds for religion renders void the statute which affords the funds. Such a test, claimed to be found in *Tilton* v. *Richardson,* 403 U.S. 672 (1971), is without a pebble of basis in that case and, furthermore, has implications of staggering magnitude. See Jurisdictional Statement, 12-14.

CONCLUSION

In view of the foregoing, the Appellant parents, Jose Diaz, *et al.*, pray that the Court note probable jurisdiction herein and that they be given the opportunity to present a brief and oral argument to the Court.

Respectfully submitted,

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